

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35030

ROBERT BAGSHAW,	)	2010 Unpublished Opinion No. 434
	)	
Petitioner-Appellant,	)	Filed: April 20, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

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LANSING, Chief Judge

Robert Bagshaw appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

Bagshaw was convicted of rape and sentenced in October 2000. Bagshaw appealed, and the Court of Appeals affirmed his judgment of conviction and sentence in November 2001. In February 2003, Bagshaw filed an application for post-conviction relief alleging ineffective assistance of counsel. The district court summarily dismissed the application. Bagshaw filed a successive petition for post-conviction relief in November 2007, alleging various errors, including ineffective assistance of counsel, surrounding the psychosexual evaluation prepared for sentencing. Bagshaw argued that *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2007) announced a new rule that should be applied retroactively in his case making his application timely. The district court dismissed the application because it was successive and barred by the one-year statute of limitation. Bagshaw appeals.

Our review of the district court's construction and application of the limitation statute is a matter of free review. *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992). The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman*, 122 Idaho at 628, 836 P.2d at 1089. The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

Bagshaw filed his application for post-conviction relief nearly six years after the determination of his appeal in the criminal case. Therefore, his application is clearly untimely. However, Bagshaw argues that his application should be deemed timely because the Idaho Supreme Court announced a new rule of law in *Estrada* that should be applied retroactively. Bagshaw acknowledges that the Idaho Supreme Court has held, by way of dicta, that *Estrada* did not announce a new rule of law to be given retroactive application. *See Vavold v. State*, 148 Idaho 44, 46, 218 P.3d 388, 390 (2009). Bagshaw also acknowledges that this Court has held that *Estrada* did not announce a new rule of law to be given retroactive application. *See Kriebel v. State*, 148 Idaho 188, 191, 219 P.3d 1204, 1207 (Ct. App. 2009). Nonetheless, Bagshaw argues that *Estrada* should be applied retroactively in his case because there is no controlling Idaho Supreme Court precedent on the issue. However, this Court's holding in *Kriebel* is controlling precedent in the absence of any Idaho Supreme Court holding to the contrary. Bagshaw makes a lengthy argument as to why *Estrada* announced a new rule of law and why it should be applied retroactively. We need not further address this issue, as we have already done so.

Bagshaw argues that the statute of limitation should be tolled. However, the only basis he provides to equitably toll the statute of limitation is the retroactive application of *Estrada*. This argument is without merit. Accordingly, the district court's order summarily dismissing Bagshaw's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Judge GUTIERREZ and Judge GRATTON CONCUR.